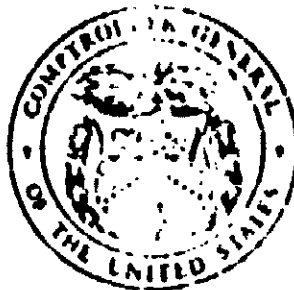


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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-205198.2

DATE: March 25, 1982

MATTER OF: Total Carpentry Ltd.

DIGEST:

1. Bid accompanied by bid bond which contains a condition that the bond is valid only with the indemnification of the SBA is properly rejected as nonresponsive in the absence of SBA's indemnification.
2. Protest contention, raised for the first time in comments on agency report, that the IFB be resolicited, is untimely and not for consideration under GAO Bid Protest Procedures, since it was raised more than 10 days after the protester knew or should have known this basis for protest.

Total Carpentry Ltd. (Total) protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DACA51-82-B-0002 issued by the New York District, Corps of Engineers, for plant door rehabilitation at the Stratford Army Engine Plant, Stratford, Connecticut. Total contends that the rejection of its bid because of its alleged failure to comply with the bid guarantee requirements was improper. Based upon the record before us, we deny the protest.

Total's bid bond was issued by the Indemnity Insurance Company of North America (Indemnity). The bond was accompanied by a power of attorney which carried the condition that the attorney-in-fact who executed the bid bond on behalf of Indemnity was authorized to act on behalf of that surety only on bonds which had the indemnification of the Small Business Administration (SBA). In Department of Agriculture, Forest Service--Advance Decision, B-198915, July 1, 1980, 80-2 CPD 5, we indicated that, where the power of attorney accompanying a bond limits the attorney-in-fact to executing bonds having SBA indemnification, the contracting officer should obtain adequate assurance that the SBA qualification is satisfied. The SBA advised the contracting officer that Total was not involved in the SBA's Surety Bond Guarantee

program, which administers the indemnification of bonds. The contracting officer states that, since the condition of the bond was not met, he found Total's bid bond to be invalid and by letter of November 23, 1981, advised Total that its bid was being rejected as nonresponsive.

Total's position is that its failure to be enrolled in the SBA's Surety Bond Guarantee program is a "technical inadvertence." Total contends that the bonding company at all times has been ready, willing and able to supply the payment and performance bonds without any condition as to the SBA guarantee.

Paragraph 2.5 of the IFB requires that each bidder submit with the bid a bid guarantee in the amount of 20 percent of the bid price or \$3 million, whichever is less. Paragraph 4 of Standard Form 22, "Instructions to Bidders," states that where a bid guarantee is required by the IFB, failure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid.

We have held that a bid guarantee requirement is a material part of an IFB, and that, except as provided in applicable regulations, a procuring activity must reject as nonresponsive a bid that does not comply with that requirement. Zemark International Construction Co., B-203020, May 12, 1981, 81-1 CPD 372; Ron Groves, Heating, Air Conditioning, and Piping, Inc., B-198687, May 23, 1980, 80-1 CPD 360; Charles Bainbridge, Inc., B-186060, July 23, 1976, 76-2 CPD 160. Defense Acquisition Regulation (DAR) § 2-404.2(h) (1976 ed.) provides that, when a bid guarantee is required and a bidder fails to furnish it in accordance with the requirements of the IFB, the bid must be rejected unless one of the exceptions of DAR § 10-102.5 applies. None of those exceptions applies here. Further, our Office has held that "Generally, suretyship arises only by the express agreement of the surety to be bound on behalf of the principal." Long's Air Conditioning, Inc., B-187566, January 6, 1977, 77-1 CPD 11.

Here, the surety is not bound on behalf of Total, since the expressed precondition that Total be in the SBA's indemnification program has not been met. Therefore, the Government is not obtaining the protection it would have if the bond complied with the requirements

of the IFB. Under these circumstances, Total has submitted an inadequate guarantee which renders the bid nonresponsive.

In its comments on the Army February 16, 1982, report, Total protests for the first time that, in the event Total's bid is unacceptable, the procurement should be resolicited. This basis of protest is untimely under section 21.2(b)(2) of our Bid Protest Procedures (4 C.F.R. part 21 (1981)), since it was not raised within 10 days after receipt of the November 23, 1981, notification that Total's bid was rejected as nonresponsive. Radix II, Inc., B-186999, February 8, 1977, 77-1 CPD 94.

Accordingly, we deny the protest in part and dismiss it in part.

for *Milton J. Fowler*
Comptroller General
of the United States